TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 720.

HUGH MURPHY, APPELLANT,

vs.

THE COLORADO PAVING COMPANY; W. S. BINES AND LORENZO J. LAMPSON, COPARTNERS UNDER THE FIRM NAME AND STYLE OF F. O. BLAKE & COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED FEBRUARY 24, 1897.

(16,499.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 24, 1897.

1 Pleas in the Circuit Court of the United States within and for the District of Colorado, Sitting at Denver.

Be it remembered that heretofore and on, to wit, the 12th day of February, A. D. 1897, came Hugh Murphy, by Thomas, Bryant & Lee, his solicitors, and filed in said court his bill of complaint and sued out of and under the seal of said court a subpœna in chancery against The Colorado Paving Company, W. S. Bines and Lorenzo J. Lampson, copartners under the firm name and style of F. O. Blake and Company; Edward Monash, George C. Norris, and William W. Booth, comprising the Board of Public Works of the City of Denver; T. S. McMurray, mayor of the city of Denver, and The City of Denver, a municipal corporation.

And the said bill is in words and figures as follows, to wit:

2 UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

In the Circuit Court.

HUGH MURPHY, Complainant,
vs.
THE COLORADO PAVING COMPANY; W. S. BINES and LORENZO J. Lampson, Copartners under the Firm Name and Style of F. O. Blake & Company; Edward Monash, George C. Norris, and William W. Booth, Comprising the Board of Public Works of the City of Denver; T. S. McMurray, Mayor of the City of Denver, and The City of Denver, a Municipal Corporation, Respondents.

To the honorable the judges of the circuit court of the United States within and for the district of Colorado, upon the chancery side thereof:

Your orator, humbly complaining of the respondents above named and each of them, respectfully represents and shows unto your honors:

1st. That your orator is a citizen of the State of Nebraska, and that the respondents above named and each of them and all of them are citizens of the State of Colorado, and that the amount in controversy in this suit, exclusive of interest and costs, is over and above the sum of two thousand dollars.

2nd. That the respondents Edward Monash and George C. Norris, with one Frank H. Strong, were at all the times mentioned
3 in this bill of complaint prior to the third day of September, A. D. 1896, the Board of Public Works of the City of Denver; that on or about the said 3rd day of September, A. D. 1896, the said Frank H. Strong departed this life, leaving a vacancy upon said board, which was filled by the appointment of the respondent William W. Booth, and since said time the said Board of Public Works of the City of Denver has consisted of the said Edward

Monash, George C. Norris, and William W. Booth; that the said respondent, T. S. McMurray, is the duly elected and acting mayor of the said city of Denver and was such during all the period of time mentioned in this bill of complaint, and the city of Denver is a municipal corporation duly organized and incorporated by a general law of the State of Colorado.

3rd. That during the past two years and for some time prior thereto there has been presented to the respondents The Board of Public Works of the City of Denver various petitions of property-owners located upon certain streets in the city of Denver, petitioning said board of public works to order paving along those particular streets and to create paving districts, as mentioned in said petitions; that all of said petitions have asked that the said districts be paved with what is known as the sheet-asphaltum pavement, as by the charter of the city of Denver they had a right to do, and that said board, as required by the charter of the city, has attempted to act upon some or all of said petitions, and has created certain paving districts, given notice to the property-owners of the same, prepared ordinances and submitted them to the city council of the city of Denver, and attempted to order paving in certain of said districts in said city, in compliance with the provisions of the charter of the city.

4 4th. That your orator is a contractor of many years' experience, and among other public contracts which he has taken are those for the laying of asphalt pavements, and that he is now engaged in the business of laying sheet-asphaltum pavements; that he has been desirous of bidding on whatever paving was to be let in the city of Denver, and has bid upon paving in said city in three districts so established by the board of public works and the ordinances of said city passed in accordance with the charter provisions thereof, to wit, Fifteenth paving district, number one, of the city of Denver, Broadway paving district, number one, of the city of Denver, and Broadway paving district, number two, of the city of Denver, and under the provisions of the charter of the city of Denver your orator became entitled to the contracts for paving said districts, but your orator respectfully represents and shows unto your honors that he has been prevented from being awarded any and all of said contracts, and his bids have not been acted upon by said board of public works, in pursuance of an unlawful plan and design upon the part of said board wholly to prevent your orator from receiving any contract for paving in the city of Denver; and your orator charges the fact to be that the Colorado Paving Company, a corporation organized under the laws of the State of Colorado, and the respondents above named and the partnership consisting of W. S. Bines and Lorenzo J. Lampson, under the firm name and style of F. O. Blake & Company, have entered into a corrupt and unlawful agreement, in and by which all bids which they put in for paving to the said board of public works shall be so arranged that each shall receive a certain proportion of the contracts to be let in the city of Denver and at exorbitant and extravagant prices therefor; that they have agreed between

5 themselves to divide up the territory of said city, each to re-

ceive its proportion of the paving to be laid; that their bids will be so arranged by means of previous consultation and concert so that this result will be obtained; that they further entered into a corrupt and unlawful agreement that no other contractor for asphalt paving or persons engaged in the business of laying asphalt paving shall be permitted to bid against them or permitted to receive any contracts from the city of Denver, no difference what their bids may be; that this unlawful agreement between said paving contractors above named has been well known to said board of public works at all times since it was entered into, on or about the month of July, A. D. 1895; that said board as constituted at the time was perfectly familiar with the arrangement which was made between said conspirators and fully acquiesced therein and became a party thereto, and the board as at present constituted has also been cognizant of said contract and agreement and perfectly familiar with the unlawful and corrupt agreement entered into between the said The Colorado Paving Company and F. O. Blake & Company and have agreed with said parties that they will carry out upon their part said unlawful agreement, and that the said board of public works has at all times agreed with said parties to this unlawful agreement that the city shall be divided between said paving companies in accordance with the terms of their agreement, and have further agreed that they will so arrange their plans and specifications for all paving which shall be laid in the city of Denver so that all persons except the parties to said unlawful agreement bidding upon any paving will be excluded and their bids rejected, and have so arranged the plans and specifications that no other material except that owned and controlled by the parties to this unlawful
6 agreement shall be admitted or used in said city, and have also agreed that after bids have been received they will so construe the same and pass upon them; that all bids, save and except those made by the parties to said unlawful agreement, will be rejected and the paving let to one or the other of said favored paving contractors, and that in pursuance of said unlawful agreement between the said paving contractors and the said board of public works all contracts that have been attempted to be let or that have been advertised since the summer of 1895 for paving have been let or attempted to be let in accordance with the terms of said unlawful contract, and the parties to the same and the board of public works have lived up to its unlawful terms and conditions and have excluded all bids made by other parties than the parties to said unlawful contract, and have done all other acts necessary to carry out its unlawful terms.

5th. That among other districts established by the board of public works was one established on or about the 22nd day of August, A. D. 1895, upon the petition of the property-owners, and called Fifteenth street paving district, No. 1, of the city of Denver; that upon said day the said board gave notice to the property-owners that said petition had been presented for paving the same with a sheet-asphalt wearing surface equal in quality and composition to the best then in use in the city of Denver; that the board

advertised and adopted full details, plans, and specifications for said improvement, and announced that on Monday, the 23rd day of September, A. D. 1895, the resolution ordering said improvements and in accordance with the details, plans, and specifications, map
7 and estimate, would be considered by said board; that said notice was duly published, as required by the charter of the city of Denver, and, no sufficient remonstrance having been received, the ordinance providing for said paving and creating said Fifteenth street paving district, No. 1, of the city of Denver was prepared by the said board of public works and submitted to the city council of the city of Denver and on the 4th day of November, A. D. 1895, was duly passed by the city council and signed by the mayor of said city, and that the said ordinance was afterwards published as required by the charter of the city of Denver.

6th. That afterwards and on the 13th day of November, A. D. 1895, the said board of public works gave a published notice to bidders that on the 23rd day of November, 1895, bids would be received upon the details, plans, and specifications of the board at that time on file, and that upon opening the bids the same would be canvassed forthwith and the results thereof certified to the mayor with the recommendation of the board as to who was the lowest responsible bidder; that your orator put in a bid upon said paving, and was the lowest reliable and responsible bidder thereon, and there were four other bidders upon the same, to wit, the Blake Asphalt Company, the Colorado Paving Company, the Western Bermudez Company, Limited, and F. O. Blake and Company; that said board upon said 23rd day of November met and received bids, and in pursuance of its understanding and agreement with the Colorado Paving Company and F. O. Blake & Company rejected all of the bids, save and except those put in by these two paving contractors, and recommended to the mayor of the city that said contract be let to F. O. Blake & Company; that your orator thereupon filed a written protest with the said board and the Hon.
8 T. S. McMurray, mayor of said city, and was given a hearing before said mayor, and, as your orator is informed and believes, the mayor announced to the board that he would not sign a contract under those circumstances; and thereupon the board at a meeting held shortly thereafter rejected all bids made at that time.

7th. That thereupon said board, in furtherance of its conspiracy and agreement with the Colorado Paving Company and F. O. Blake and Company, attempted to change the plans and specifications which it had theretofore adopted with the sole intent and purpose of so arranging said plans and specifications that no one could bid upon paving about to be laid except the Colorado Paving Company and F. O. Blake & Company, and that persons bidding upon asphalts and upon the plans and specifications so adopted other than the Colorado Paving Company and F. O. Blake & Company would have their bids rejected; and having adopted such amended plans and specifications, they advertised for new bids to be received upon the 2nd day of January, A. D. 1896, and prescribing in said

notice the kinds of asphalt upon which bids would be received, and naming certain other asphalts (among which was the one which your orator had been using) upon which it announced bids would not be received, all of which action of said board was in furtherance of the conspiracy and agreement with F. O. Blake & Company and the Colorado Paving Company, and on the said 2nd day of January your orator prepared and submitted to the said board his bid for the paving of Fifteenth street paving district, No. 1, in the city of Denver, and your orator was the lowest reliable and responsible bidder; that four other bids were presented to said board upon said day, to wit, those of
9 the Colorado Paving Company, the Western Bermudez Asphalt Company, Limited, F. O. Blake & Company, and the Blake Paving Company, and that said board at its meeting upon said day, in pursuance of said unlawful conspiracy, did reject all bids save and except those of the Colorado Paving Company and F. O. Blake & Company, and did recommend to the mayor of the city of Denver that the contract be awarded to F. O. Blake & Company; that your orator thereupon protested to the mayor of the city, but said protest was disregarded, and the mayor was about to let said contract when your orator applied to this court for an injunction restraining him from awarding the said contract, and this court did grant a temporary restraining order, and afterwards, upon a full hearing, did grant a temporary injunction restraining the letting of said contract upon the bidding made upon the said 2nd day of January, A. D. 1896.

8th. That thereupon the said board of public works and the Colorado Paving Company and F. O. Blake and Company, convinced of the correctness of the ruling of this court, permitted a final decree to be entered in favor of your orator, as in and by his said bill of complaint he had prayed, but determined to carry out the terms of their said conspiracy and unlawful contract, and for the purpose of carrying out the same the said board recommended to the city council of the city of Denver an ordinance repealing the ordinance adopted upon the 4th day of November, A. D. 1895, creating the Fifteenth street pacing district, No. 1, and said city council afterwards passed said ordinance, and thereupon the said board attempted to adopt amended plans and specifications for the letting of said paving, gave new notice on the 20th day of March, A. D. 1896, to the property-owners in said Fifteenth street
10 paving district, No. 1, that on Monday, the 27th day of April, A. D. 1896, they would consider a resolution ordering said paving, and afterwards, no remonstrance against said paving having been filed, the ordinance was prepared by said board, which was passed by the city council of the city of Denver and approved by the mayor on the 20th day of June, and that they afterwards gave notice by publication that on Monday, the 6th day of July, A. D. 1896, at the hour of eleven o'clock a. m. of said day, they would receive bids for the paving of said Fifteenth street paving district, No. 1, and would award the contract to the lowest reliable, responsible bidder.

9th. That all of the said doings of the board—the repealing of the original ordinance creating said Fifteenth street paving district, No. 1, the adopting of a new ordinance, and the changing of the specifications—were done for the sole purpose of preventing your orator from bidding upon said paving and with the intent and purpose of awarding said paving either to the Colorado Paving Company or F. O. Blake & Company, and that the main change in the specifications prepared by said board was one providing that the asphalt upon which bids should be received should be either Trinidad Lake asphalt, obtained from the pitch or asphalt lake in the island of Trinidad, or Pacific asphalt paving cement, obtained from the mines of the Pacific Asphalt Company, in Santa Barbara, California, or Bermudez Lake asphalt, obtained from the asphalt lakes in the province of Bermudez, Republic of Venezuela, South America, or other asphalts which in the judgment of said board were of equal standard and quality, all of which asphalts named were under the exclusive control of the respondents herein, who were parties to the unlawful contract above set forth, and which prevented any one
11 else from bidding under said specifications, all of which was well known to the sa-d board of public works, and is the reason why said specifications were so drawn and prepared; that said specification is not in accordance with the requirements of the charter of the city of Denver, which requires the said board to establish some standard or quality by which it could be readily ascertained whether or not the bid complied with the same; but instead of that the board has left the matter to their own judgment, and has given no definite standard or quality; that the board left the matter in this way to its own judgment, instead of establishing some recognized test by which the standard and quality could be gauged, for the sole purpose of rejecting any bid which your orator may make, and by saying that, in their judgment, the asphalt proposed to be used by your orator was not of the same standard or quality as the other asphalts named, thereby preventing your orator from bidding upon said work; and that said board, in further pursuance of its said unlawful conspiracy, in the printed plans and proposals given to the bidders, inserted a provision in violation of the city charter of the city of Denver, to wit, a clause reserving to it the right to reject any and all bids, thereby giving them authority to reject your orator's or any other bid, and awarding the contract to its favored contractors, and in other particulars said plans and specifications and proposals to said bidders were so drawn as to leave matters to the judgment of the board without any settled rule or gauge by which bids could be measured, and thereby permitting the board, in their arbitrary judgment, to reject the bid of your orator, and that the same unlawful plans and specifications and conditions are to be found in all proposals for bids which said
12 board has adopted, and the only paving upon which bids have been received since the summer of 1895, when said unlawful agreement and conspiracy was entered into, has been that hereinabove referred to.

10th. That your orator, upon the appointed time, on the 6th day

of July, A. D. 1896, came from Omaha, in the State of Nebraska, and prepared and tendered a bid to the said board of public works for the paving upon Fifteenth street paving district, No. 1, and also a bid upon the Broadway paving district, No. 1; that said bids were received by the said board upon the said day, together with four other bids prepared and tendered to the said board, to wit, the bids of F. O. Blake & Company, the Western Bermudez Company, Limited, the Colorado Paving Company, and one William S. Hipp, the same persons bidding upon each contract, and of said bids that of William S. Hipp seemed to be the lowest bid, and that of your orator was the next lowest, but said board rejected the bid of William S. Hipp for the reason that he was not the lowest reliable and responsible bidder; that the said respondents herein, in pursuance of their unlawful contract and agreement, procured the said William S. Hipp, who was a wholly irresponsible person, who had never engaged in any asphalt paving in his life and had no experience therein, to put in the two bids for the purpose of making him apparently the lowest bidder, instead of your orator; that they furnished the said Hipp with certified checks drawn upon one of the national banks of the city of Denver, the said Hipp himself not being financially responsible or able to produce a certified check for any amount whatever; yet he presented to said board two certified checks for
13 the sum of five thousand dollars each, and that the bid of the said Hipp was wholly at the instigation and request of the said conspirators herein, and was not a *bona fide* bid or one upon which the board could act; that your orator was in reality and in fact the lowest reliable and responsible bidder for each of said contracts; that your orator complied with all the terms and conditions laid down by the charter of the city of Denver and required by the board of public works and other officers of said city, and became and was entitled to the two contracts mentioned; but the said board of public works, in pursuance of its unlawful contract and agreement with the other respondents herein, and for the purpose of aiding and assisting the said respondents in carrying out their unlawful agreement, passed a resolution on the 7th day of July, 1896, rejecting the bid of your orator for certain pretended reasons, none of which were true, and by reason of the rejection of your orator's bids there were left but three bids for the consideration of the board, those of the Colorado Paving Company and the Western Bermudez Company, Limited, which were really those of one company, as both of said corporations are owned and controlled by the Barber Asphalt Company, a corporation organized under the laws of the State of New York, so that there was no practical competition or any competition whatever between said companies, the Barber Asphalt Company putting in the bid of each of said companies for the purpose of pretending that there was a competition between them and the other bid, that of F. L. Blake & Company, so that all of the bids considered by said board were those of the Colorado Paving Company and F. O. Blake and Company, the parties to said unlawful contract and agree-

ment, and that said board, in accordance with its pre-
14 vious understanding with said two conspirators, and in carrying out its corrupt and unlawful agreement with said contractors, and in pursuance of the unlawful conspiracy and agreement between said contractors, awarded one contract to the Colorado Paving Company, to wit, that of Broadway paving district, No. 1, and the other contract, that of Fifteenth street paving district, No. 1, to F. O. Blake & Company, thus giving to each of the parties to said unlawful contract and agreement a paving contract, all of which was contrary to equity and the rights of your orator in the premises, and notwithstanding the fact that your orator's bid upon Broadway paving district, No. 1, was some twelve thousand dollars less than that of the Colorado Paving Company, and your orator's bid upon Fifteenth street paving district, No. 1, was over $6,000 less than that of F. O. Blake & Company.

11th. That the mayor of the city having informed your orator that he proposed to award the contracts in accordance with the recommendation of the board of public works, although he believed that said board was not acting right in the matter, your orator thereupon filed a bill in equity in this court asking for an injunction restraining the said mayor of the city from awarding said contract in accordance with said recommendations, and the honorable judges of this court did grant to your orator a temporary restraining order until your orator's application for an injunction could be heard upon the merits, and did set a day when said matter could be fully heard, upon which day, to wit, the 24th day of July, 1896, the same was fully heard and the respondents given an opportunity to rebut the charges made by your orator, which were the same as those made in this bill, and that after full hearing and argument
15 the honorable judges of this court did grant a temporary injunction upon the ground that your orator had established the charges made in his said bill; that thereupon the said respondents appealed the case to the United States court of appeals for the eighth judicial circuit, and the same was heard at the December term thereof, and on the 18th day of January, 1897, an order was entered reversing the action of this court upon the ground that your orator had no right as the lowest bidder to maintain the suit, and the court was, therefore, without jurisdiction, but that said suit is now pending in said court and undetermined, your orator intending to file a petition for rehearing therein, and argue said matter at length, the said court having held upon the questions of fact raised in your orator's bill that the charges made were true.

12th. That a petition having been presented to the board of public works from the property-owners on Broadway between Colfac avenue and Ninth avenue, the board of public works, by resolution, on the 24th day of April, 1896, adopted full details and specifications for the grading, curbing, and paving of said street, designating the same as Broadway paving district, No. 2, and did thereupon advertise for twenty days in a newspaper published in the city of Denver for remonstrances from the tax-payers, but no remonstrances having been filed, the said board, on the 26th day of May, 1896, ordered

said improvements and prepared an ordinance creating said paving district, designating it as Broadway paving district, No. 2, of the city of Denver, and ordering said improvements, which ordinance was submitted to the city council of the city of Denver and duly passed by said council, the same being ordinance numbered thirty-three, series of 1896, and entitled A bill for an ordinance
16 creating the Broadway paving district, No. 2, of the city of Denver, and authorizing the grading, curbing, paving, and otherwise of Broadway, in said district, which said ordinance was duly passed by both branches of the city council of the city of Denver and approved by the mayor of said city on the 18th day of July, A. D. 1896, and was duly published in the Denver Republican on the 23rd day of August, A. D. 1896, and became and was a valid ordinance of the city of Denver; and the said board in other things complied with the charter of the city of Denver and duly created said Broadway paving district, No. 2, and the said board thereupon advertised that upon Monday, September 7th, 1896, at 11 o'clock a. m., they would receive bids for the awarding of said contract, and upon said bids being opened it was found that there were three—that of the Colorado Paving Company, F. O. Blake & Company, and your orator—and that your orator was the lowest reliable and responsible bidder therefor, being some eight thousand dollars less than the Colorado Paving Company, the next highest bidder; that before said bids were put in it had been agreed by and between the board of public works and the Colorado Paving Company and F. O. Blake & Company that said contract should be awarded to the Colorado Paving Company as a continuation of Broadway paving district, No. 1, and the same unlawful plans and specifications referred to in paragraph nine of this bill of complaint were contained in the plans and specifications for Broadway paving district, number two, and the said board again unlawfully attempted to retain the right to reject any and all bids, although the charter of Denver only gives them the right to reject all bids; and the bids were so arranged that this result should be accomplished, but the said board, after considering said bids and knowing full well the rights of your orator in the premises, passed a resolution rejecting all bids, and no further advertisement was made upon said paving district until the month of January, 1897, and that on or about the 3rd day of January, 1897, they published a notice that upon the
17 28th day of January, A. D. 1897, at the hour of 11 o'clock in the forenoon of said day, they would receive bids for the paving of said Broadway paving district, No. 2; that your orator thereupon came from the city of Omaha, State of Nebraska, and spent considerable time and money in the preparation of the said bid; that he procured the sum of $5,000, deposited the same in the First National bank in the city of Denver, took a certified check for the same, payable to the order of the city treasurer, and prepared a bid complying in every particular with all the requirements of the said charter of the city of Denver and the notice given by the board of public works and of the plans and specifications prepared by them, and did, on the 28th day of January, tender the

same to said board at the appointed time; that when the bids were opened upon that day it was found there were four bids presented, to wit, the Colorado Paving Company and its ally, the Western Bermudez Company, Limited, F. O. Blake and Company, and your orator; that your orator was the lowest reliable and responsible bidder, and, in pursuance of the previous plan and agreement between said parties, the Colorado Paving Company was the next lowest bidder, but the bid of your orator was again some six thousand dollars less than that of the Colorado Paving Company; that the three bids of the Colorado Paving Company, the Western Bermudez Company, Limited, and F. O. Blake & Company were those of the parties to the unlawful contract and agreement and were made in accordance with a previous understanding between said parties and with the board of public works; that there was no genuine competition or any competition of any kind, nature, or description between said parties; that the said
18 board of public works upon receiving said bids adjourned the consideration of the same over for several days and pretended to make an investigation of said bids, although they had already agreed long prior to the receiving of said bids that they would award the contract to the Colorado Paving Company, and finally, upon Friday, the 11th day of February, A. D. 1897, they passed a resolution rejecting the bid of your orator and recommending that the contract for the paving of Broadway paving district, No. 2, be awarded to the Colorado Paving Company; that said action and resolution of the board were wholly contrary to the provisions of the charter of the city of Denver, contrary to the powers and duties of said board of public works, and destructive of the rights of your orator in the premises; that your orator was the lowest reliable and responsible bidder upon said work, and under the provisions of the charter of the city is entitled to be awarded said contract, and that the only reason why the said board of public works passed the resolution and awarded the contract to the Colorado Paving Company instead of to your orator was to carry out its corrupt and unlawful agreement with the Colorado Paving Company and F. O. Blake & Company, in and by which the said board had agreed that they should receive all contracts for paving in the city of Denver, and that the bids of other parties should be rejected, and for no other reason whatever did said board reject the bid of your orator and award the contract to said company.

13th. That at the time your orator filed his said bid he entered into a preliminary contract with the city of Denver in accordance with the terms of its charter, in and by which it was agreed
19 that in case his bid was the lowest the city would sign and deliver to him a formal contract for the paving of said district; that said contract was in the shape of a written proposal, accompanied by a contract delivered to him by the Board of Public Works of the City of Denver, and stating that upon no other form of contract or bid could your orator prepare and tender his bid, and only requiring the signature of the mayor of said city of Denver to

make it a valid and existing contract; that among other provisions of said contract was the following:

"The bidder also proposes to be ready and appear at the office of the mayor of the city of Denver and to duly execute the following form of contract, in accordance with the terms of this bid, and to furnish and have ready such sureties as may be satisfactory to the board of public works in the city of Denver, and to do the same at any time within ten days of the date of a written notice so to do from the board of public works, mailed to the address below given.

"As a guarantee of the good faith and responsibility of this bidder, there is enclosed a cashier's check on a Denver bank of known standing in the sum of five thousand dollars ($5,000).

"Said check is made payable to the order of the treasurer of the city of Denver, and if this proposal is not accepted within 30 days of the date hereof it shall be returned to the undersigned. If it be accepted and the bidder shall not properly respond to such notice of acceptance as above provided, then said check shall be cashed and paid into the treasury of the city of Denver as liquidated damages for the failure to comply with the terms of this bid."

That in accordance with this contract your orator prepared and submitted his bid and a certified check on the First National Bank of the City of Denver in the sum of five thousand dollars, payable to the order of the city treasurer of said city, which said check is now in the possession of the officers of said city, and your orator in all things fully complied with all the requirements and conditions contained and set forth in said contract and proposal, and became and was entitled to be awarded said contract under the provisions of the charter of the said city, and is only prevented from receiving the same by reason of the unlawful and corrupt conduct of said board and its corrupt and unlawful agreement with the Colorado Paving Company and F. O. Blake and Company, as herein set forth; that your orator spent considerable money and time in preparing and tendering said bid; that he has been to great and enormous expense in preparing himself to enter upon and into the business of laying asphalt pavements, and is fully prepared by experience and with the necessary capital and funds to carry out and perform said contract, and that said contract is worth to your orator the sum of at least five thousand dollars, and by reason of the above facts the city of Denver entered into a contract with your orator to award him said contract, and under the rules and principles of a court of equity should be compelled specifically to perform its agreement to award said contract to your orator, and that in case it fails so to do it will result in great and irreparable damage and mischief to your orator, in that it will be a reflection upon his standing as an asphalt contractor, prevent him from receiving contracts in other cities by damaging his reputation as a contractor of public works, and in other ways result in great and irreparable damage and loss to your orator.

And your orator further shows that the board of public works has violated the charter of the city of Denver in its attempt to award the contract herein mentioned to the Colorado Paving Com-

pany, in that there was no genuine competition or any competition between the other bidders than your orators upon said date, and in case the mayor of the city should award said contract, as he has stated that he will award it, to the Colorado Paving Company, it would be a damage to your orator in a sum greatly in excess of five thousand dollars, and it will be an additional tax and burden upon the citizens and property-owners of Broadway paving district, No. 1, to the extent of over twelve thousand dollars.

14th. Your orator further represents that while said board rejected your orator's bid upon the alleged ground that the kind of asphalt which he proposed to use was not of an equal standard or quality to that proposed to be used by the Colorado Paving Company, your orator avers that said reason is wholly false, and that as a matter of fact the asphalt which your orator proposes to use is of a superior grade to that proposed to be used by the Colorado Paving Company, which fact was well known to the board of public works; that the said board never investigated the character of the asphalts or made any examination of the same, but simply set forth that as an excuse or reason for rejecting your orator's bid and for the purpose of carrying out its unlawful and corrupt agreement with the respondents The Colorado Paving Company and F. O. Blake & Company; and your orator further avers that another reason and one of the real and substantial reasons why the said board refused to permit your orator to be given any contract in the city of Denver is that he is a resident of the State of Nebraska, while a large number of the stockholders and many of the officers of the Colorado Paving Company are citizens and residents of the city of Denver, and the board proposes and does unlawfully discriminate in favor of the citizens of Denver and against your orator and thereby deprive him of the equal protection of the laws of the State of Colorado and deprive him of his property without due process of law and for the sole reason that he is a citizen of another State.

15th. That by reason of the foregoing facts your orator is wholly without remedy in a court of law and can only secure proper redress in a court of equity; and, forasmuch as your orator can have no adequate relief except in this court, he prays that the most gracious writ of subpœna may issue out of and under the seal of this honorable court, directed to the marshall of the United States for the district of Colorado, and commanding him to summon said respondents and each of them, on a day certain, to appear and answer to this bill of complaint, and to abide by and perform such order and decree in the premises as to your honors shall seem meet and proper and required by the principles of equity and good conscience; that in the meantime a temporary injunction issue out of and under the seal of this honorable court, directed to said board of public works and the mayor of the city of Denver, requiring them wholly to refrain from letting the said contract for the paving of Broadway paving district, No. 2, of the city of Denver to the respondent The Colorado Paving Company or to any one else save and except to your orator, until the further hearing and order

of this court, and that upon such final hearing the Board of Public Works of the City of Denver be required to receive the bid of your orator and canvass the same, together with other bids, and to carry out and specifically perform the contract of the said city of Denver entered into with your orator to award him said contract, and that the said temporary injunction restraining the respondents from awarding the contract to the Colorado Paving Company be made perpetual, and that your orator be given such other and further relief as to equity and good conscience shall seem meet.

THOMAS, BRYANT & LEE,
Solicitors for Complainant.

23 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Hugh Murphy, being first duly sworn, upon his oath deposes and says that he is the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, save and except as to the matters and things therein stated upon information and belief, and as to them he believes it to be true.

HUGH MURPHY.

Subscribed and sworn to before me this 12th day of February, A. D. 1897.

ROBERT BAILEY, *Clerk,*
[SEAL.] By F. W. TUPPER,
Deputy Clerk.

(Endorsed:) 3526. Circuit court, district of Colo. Hugh Murphy *vs.* The Colo. Paving Co. *et al.* Bill of complaint. Filed Feb. 12, 1897. Robert Bailey, clerk. Thomas, Bryant & Lee, solicitors for complainant.

24 76th day.

SATURDAY, *February 13th, A. D.* 1897.

Present: The Honorable Moses Hallett, district judge, and the Honorable John A. Riner, district judge of the district of Wyoming, assigned to the district of Colorado, and other officers as noted on the 3d day of November last past.

And before the Honorable Moses Hallett, district judge, the following proceeding was had:

HUGH MURPHY
vs.
THE COLORADO PAVING COMPANY *et al.* } 3526. In Chancery. Bill for an Injunction.

On this 12th day of February, 1897, the complainant above named appeared, by W. H. Bryant, his solicitor, and filed herein his bill of complaint and prayed the court that upon said bill of complaint a temporary restraining order issue out of and under the

seal of this court, directed to the respondents, enjoining and restraining them from letting the contract for the paving of Broadway paving district, number 2, in the city of Denver, until a hearing could be had upon an application for a temporary writ of injunction and until the further order of this honorable court, and the court, having examined the bill of complaint and being of the opinion that under the decision of the United States circuit court of appeals in the case of The Colorado Paving Company and others *vs.* Hugh Murphy, lately pending in that court and decided on the 18th day of January, A. D. 1897, the said complainant has no right to bring or maintain a suit, did deny said application for
25 temporary restraining order, and the said court, being further of the opinion that under the decision of the said circuit court of appeals for the eighth circuit this court has not and cannot have or obtain jurisdiction of this cause, by reason of the fact that it does not present a matter coming within the jurisdiction of this court, doth order said bill of complaint dismissed of its own motion.

Wherefore it is ordered, adjudged, and decreed that the bill of complaint heretofore filed in the above-entitled cause be, and the same is hereby, dismissed for want of jurisdiction in this court to entertain and determine the matters therein set forth, at the costs of the complainant.

HUGH MURPHY
vs.
THE COLORADO PAVING COMPANY *et al.* } 3526. In Chancery. Bill for an Injunction.

At this day comes the complainant, by W. H. Bryant, Esq., his solicitor, and prays an appeal from the decree entered herein on this day to the Supreme Court of the United States, which is allowed him, conditioned, nevertheless, that he file herein his bond on such appeal in the sum of five hundred dollars ($500).

26 UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court.

HUGH MURPHY, Complainant,
vs.
THE COLORADO PAVING COMPANY and Others, Respondents. } No. 3526.

Comes now the complainant above named, Hugh Murphy, by C. S. Thomas, W. H. Bryant, and H. H. Lee, his solicitors, and says that in the record of the proceedings in the above-entitled cause the circuit court for the district of Colorado committed manifest error to the prejudice of this complainant in the following particulars, to wit:

First. The court erred in refusing to grant the temporary restraining order asked by the complainant.

Second. The said court erred in dismissing the bill of complaint

filed by the complainant, on the ground that it had not jurisdiction to entertain the same.

Wherefore said appellant prays that the decree of the circuit court may be wholly reversed, set aside, and for naught held.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Solicitors for Appellant.

(Endorsed:) 3526. Circuit court, district of Colorado. Hugh Murphy *vs.* The Colorado Paving Company *et al.* Assign-
26½ ment of errors. Filed Feb. 13, 1897. Robert Bailey, clerk. Thomas, Bryant & Lee, solicitors for compl't.

27 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court.

HUGH MURPHY, Complainant,
vs.
THE COLORADO PAVING COMPANY and Others, Respondents. } No. 3526.

I, Moses Hallett, district judge of the United States within and for the district of Colorado, do hereby certify that the above-entitled cause came on for hearing before the court, and, it appearing to the court that the circuit court of the United States did not have jurisdiction to try the same, the said cause was by the court dismissed for want of jurisdiction; that said question of the jurisdiction of the circuit court of the United States was the only one involved in said cause, and was the sole question upon which the said cause was dismissed and a final decree entered, and is the question upon which an appeal was allowed to the Supreme Court of the United States.

MOSES HALLETT, *Judge.*

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify that I am acquainted with the signature of Moses Hallett, judge of the district court of the United States within and for the district of Colorado; that I have examined the signature to the foregoing certificate and know the same to be the signature of the said Moses Hallett.

In testimony whereof I have hereunto affixed my hand and the seal of the circuit court of the United States for the district of Colorado this 13th day of February, A. D. 1897.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY, *Clerk.*

28 [Endorsed:] 3526. Circuit court, district of Colorado. Hugh Murphy *vs.* The Colorado Paving Company *et al.* Certificate of judge. Filed Feb. 13, 1897. Robert Bailey, clerk.

29 THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, Hugh Murphy and Charles E. Fanning and W. H. Bryant, as sureties, are held and firmly bound unto The Colorado Paving Company, W. S. Bines, Lorenzo J. Lampson, Edward Monash, George C. Norris, Wm. W. Barth, T. S. McMurray, and The City of Denver in the full and just sum of five hundred dollars, to be paid to the parties aforementioned, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at the November term, A. D. 1896, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between the said Hugh Murphy, as plaintiff, and The Colorado Paving Company, W. S. Bines, and Lorenzo J. Lampson, copartners as F. O. Blake & Co.; Edward Monash, George C. Norris, and William W. Barth, as the board of public works, and T. S. McMurray, as mayor of the city of Denver, and the said City of Denver, as defendants, a decree was rendered against the said Hugh Mur-
30 phy dismissing his bill of complaint, and the said Hugh Murphy having prayed an appeal to the Supreme Court of the United States, as by statute allowed, to reverse said decree, and a citation was issued and served, directed to the said The Colorado Paving Company, W. S. Bines, Lorenzo J. Lampson, Edward Monash, George C. Norris, Wm. W. Barth, T. S. McMurray, and The City of Denver, citing and admonishing them to be and appear in the United States Supreme Court, at the city of Washington, D. C., thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said Hugh Murphy shall prosecute said appeal to effect and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

HUGH MURPHY. [SEAL.]
CHAS. E. FANNING. [SEAL.]
W. H. BRYANT. [SEAL.]

Approved Feb'y 13th, 1897.
MOSES HALLETT, *Judge.*

(Endorsed:) Gen. No. 3526. Circuit court of the United States, district of Colorado. Hugh Murphy *vs.* The Colorado Paving Company *et al.* Bond, appeal to Supreme Court, $500. Filed Feb. 13, 1897. Robert Bailey, clerk.

31 *Citation, U. S. Supreme Court.*

THE UNITED STATES OF AMERICA, }
District of Colorado. }

[Vignette.]

The United States of America to the Colorado Paving Company, W. S. Bines, and Lorenzo J. Lampson, copartners under the firm name and style of F. O. Blake & Company; Edward Monash, George C. Norris, and William W. Booth, comprising the Board of Public Works of the City of Denver; T. S. McMurray, mayor of the city of Denver, and the City of Denver, a municipal corporation, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., within thirty days after the date of this citation, pursuant to an appeal prayed from a decree of circuit court of the United States for the district of Colorado on the 13th day of February, A. D. 1897, wherein Hugh Murphy is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 13th day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

MOSES HALLETT, *Judge.*

31½ [Endorsed:] Gen. No. 3526. Circuit court of the United States, district of Colorado. Hugh Murphy, appellant, *vs.* The Colorado Paving Company *et al.*, appellees. Citation. Filed in circuit court of the U. S. this 15th day of February, A. D. 1897. Robert Bailey, clerk. Thomas, Bryant & Lee, attorney-for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss.:*

I acknowledge service this 13th day of February for the Colorado Paving Company of a copy of within process.

THE COLORADO PAVING COMPANY,
By JAS. H. BROWN, *Its Attorney.*

I acknowledge service for W. S. Bines and Lorenzo J. Lampson this 15th day of Feb., 1897.

I. N. STEVENS, *Attorney.*

I hereby accept service of the within writ of citation this 13th day of February, A. D. 1897, for Edward Monash, George C. Norris, Wm. W. Booth, T. S. McMurray, & the City of Denver.

F. H. WILLIAMS,
City Attorney, Attorney for Above-named Defendants.

32 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages, numbered from one to thirty-two (1 to 32), both inclusive, to be a true, perfect, and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein Hugh Murphy was complainant and The Colorado Paving Company, W. S. Bines, and Lorenzo J. Lampson, copartners under the firm name and style of F. O. Blake & Company; Edward Monash, George C. Norris, and William W. Booth, comprising the Board of Public Works of the City of Denver; T. S. McMurray, mayor of the city of Denver, and The City of Denver, a municipal corporation, were respondents, as fully and completely as the same still remain on file or of record in my office at Denver.

Seal United States Circuit Court, District of Colorado.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 15th day of February, A. D. 1897.

ROBERT BAILEY, *Clerk.*

Endorsed on cover: Case No. 16499. Colorado C. C. U. S. Term No., 720. Hugh Murphy, appellant, *vs.* The Colorado Paving Company, W. S. Bines, & Lorenzo J. Lampson, copartners under the firm name & style of F. O. Blake & Company, *et al.* Filed February 24th, 1897.

166-719

166-719

Office Supreme Court, U. S.
FILED.
MAR 1 1897
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

HUGH MURPHY, *Appellant,*
vs.
THE COLORADO PAVING COMPANY *et al.*, *Appellees.*

720

BRIEF AND ARGUMENT OF APPELLANT

ON MOTION TO ADVANCE.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Solicitors for Appellant.

F. C. Reid & Co., Printers, 1409-11 Lawrence St., Denver.

IN THE SUPREME COURT OF THE UNITED STATES.

HUGH MURPHY, *Appellant*,
vs.
THE COLORADO PAVING COMPANY *et al.*, *Appellees*.

MOTION TO ADVANCE.

Comes now the above named appellant by C. S. Thomas, W. H. Bryant and H. H. Lee, his solicitors, and moves the Court to advance the above entitled cause upon its docket and assign the same for hearing at as early a date as possible, in accordance with Rule 32 of this Court, and, for cause of said motion, the said appellant alleges that this cause was commenced in the Circuit Court of the United States for the District of Colorado on the 12th day of February, A. D. 1897, by the filing of a bill of complaint by the complainant, Hugh Murphy, against the respondents herein; that shortly after the filing of said bill of complaint a temporary restraining order was asked against said respondents upon the same day by the said complainant, which was by the Court denied; that thereupon and on the same day the Court entered a final decree in said cause, dis-

missing the bill of complaint filed by the complainant upon the ground that the Court had no jurisdiction whatever of the subject matter of the controversy, and could not entertain jurisdiction of the cause, and upon the next day, the 13th day of February, A. D. 1897, the Court entered of record a certificate stating that the bill of complaint had been dismissed solely upon the ground of the lack of jurisdiction, and thereupon an appeal was prayed to this Court as in and by the statute was permitted, by reason whereof this cause is brought within the provisions of Section 1 of the act of February 25, 1889, Chapter 236, 25 Statutes at Large, 693, and within the provisions of Section 5 of the act of March 3, 1891, Chapter 517, 26 Statutes at Large, 826, and within the exact terms of Rule 32 of this Court.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Solicitors for Appellant.

Received a copy of the above entitled motion to advance, this 18th day of February, A. D. 1897, and we agree that the same may be submitted to the Court for its action on the first Monday in March, A. D. 1897, or, in case the Court fails to meet that day, then upon the second Monday in March, A. D. 1897.

G. Q. RICHMOND,
Solicitor for Appellee The Board of Public Works, the Mayor of the City of Denver, and the City of Denver.

Received a copy of the above entitled motion to advance, this 19th day of February, A. D. 1897, and we agree that the same may be submitted to the Court for its action on the first Monday in March, A. D. 1897, or, in case the Court fails to meet on that day, then upon the second Monday in March, A. D. 1897.

JAMES H. BROWN,
Solicitor for Appellee The Colorado Paving Company.

I. N. STEVENS,
Solicitor for F. O. Blake & Co.

IN THE SUPREME COURT OF THE UNITED STATES.

HUGH MURPHY, *Appellant,*
vs.
THE COLORADO PAVING COMPANY *et al.*, *Appellees.*

BRIEF AND ARGUMENT OF APPELLANT

ON MOTION TO ADVANCE.

I.

STATEMENT OF THE CASE.

This suit was commenced in the Circuit Court for the District of Colorado on the 12th day of February, A. D. 1897, by the filing of a bill of complaint. At the time the bill was filed, a temporary restraining order was asked against the respondents, and the Circuit Court denied said application for a restraining order, and, upon the authority of the decision of the Circuit Court of Appeals in a case lately pending before it, dismissed the bill of complaint of its own motion, upon the ground that it had no jurisdiction to entertain the same. The suit was brought for the purpose of restraining the respondent, The Colorado Paving

Company, and the members of the Board of Public Works of the city of Denver from entering into a contract for the paving of Broadway Paving District No. 2 in said city. The allegations of the bill, in substance, are that the complainant is a paving contractor of many years' experience and engaged in the business of laying asphalt pavements; that he bid in accordance with an advertisement of the Board of Public Works upon the contract for paving Broadway Paving District No. 2, upon the 28th day of January, A. D. 1897; that under the charter of the city of Denver and the proposal and advertisement of the Board of Public Works, he became entitled to the contract; that the Board of Public Works refused to award him the contract by reason of a corrupt and unlawful agreement between The Colorado Paving Company and a partnership known as F. O. Blake & Co., which had agreed to divide all the paving in the city of Denver between them, which agreement was well known to the Board of Public Works, and said Board became a party thereto, and that solely by reason of this unlawful agreement the complainant was prevented from obtaining the contract. The Court of Appeals for the Eighth Circuit in a case between these same parties upon another paving contract in the city of Denver overruled the Circuit Court of the United States for the District of Colorado, and held that a bidder who had been deprived of his contract by these unlawful means had no right whatever to maintain such a suit, and for this reason reversed the order granting

an injunction and directed the Court practically to dismiss the bill. The Circuit Court for the District of Colorado dismissed the bill in this case upon the authority of this decision and upon the ground set forth in that decision—that the Court had no jurisdiction to entertain a suit of this kind.

II.

ARGUMENT.

We do not think that any argument is needed upon this motion. The certificate of the Judge of the Circuit Court in the case is as follows:

"I, Moses Hallett, District Judge of the United States within and for the District of Colorado, do hereby certify that the above entitled cause came on for hearing before the Court, and it appearing to the Court that the Circuit Court of the United States did not have jurisdiction to try the same, the said cause was by the Court dismissed for want of jurisdiction. The said question of the jurisdiction of the Circuit Court of the United States was the only one involved in said cause, and was the sole question upon which the said cause was dismissed and a final decree entered, and is the question upon which an appeal was allowed to the Supreme Court of the United States."

And the final decree itself expressly states that the cause was dismissed by the Court of its own motion for the reason that it did not have jurisdiction. This brings us clearly within the

provisions of the statute and the decision of this Court as to the procedure in the Court below.

Maynard vs. Hecht, 151 U. S., 324.

Under the provisions of Rule 32, the cause will be advanced and heard under the conditions prescribed by Rule 6.

We understand that Rule 6 does not require an argument to be filed upon the merits of the case, but simply on the motion.

As both sides, we believe, desire the case to be advanced, and as it comes clearly within the provisions of Rule 32, we do not think any argument is needed. The rule itself provides that causes appealed to this Court where the only question in issue is the jurisdiction of the Court below will be advanced upon motion. This is the only matter to be considered by the Court upon this appeal—as to whether or not the bill of complaint filed in the Court below stated a matter which gave the Court jurisdiction of a suit or controversy. We will, therefore, submit the motion upon this showing.

Respectfully submitted.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Solicitors for Appellant.

166-719

Office Supreme Court, U. S.
FILED.
MAR 29 1897
JAMES H. McKENNEY,
CLERK.

166-719

IN THE SUPREME COURT OF THE UNITED STATES.

HUGH MURPHY,
Appellant,
vs.
THE COLORADO PAVING COMPANY *et al.*,
Appellees.

720

BRIEF AND ARGUMENT OF APPELLANT.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Solicitors for Appellant.

F. C. Reid & Co., Printers, 1409-11 Lawrence St., Denver.

IN THE SUPREME COURT OF THE UNITED STATES.

HUGH MURPHY,
Appellant,
vs.
THE COLORADO PAVING COMPANY *et al.*,
Appellees.

BRIEF AND ARGUMENT OF APPELLANT.

I.

Statement of Facts.

This suit was commenced in the Circuit Court for the District of Colorado on the 12th day of February, 1897, by Hugh Murphy filing his bill of complaint and asking for a temporary restraining order. The Court denied the request for the restraining order, and, of its own motion, dismissed the bill of complaint for want of jurisdiction at the cost of complainant. An appeal was immediately prayed to this Court, and perfected the next day, and the presiding Judge gave a certificate that the sole reason for dismissing the bill was that the Circuit Court of the United States had no jurisdiction of the matter presented. The material allegations of the complaint are that Hugh

Murphy, a citizen of Nebraska, is a contractor for public works; that upon several occasions he put in bids for asphalt paving contracts in the city of Denver, and although his bids were the lowest, and, by the charter of the city, it was the duty of the Board to award him the contract, they were rejected and the contracts awarded to higher bidders; that the reason for the rejection of his bids was a corrupt and unlawful agreement between the Board of Public Works and two firms of paving contractors in said city, by which it was agreed that all paving contracts should be divided up between these favored contractors; that on the 28th day of January, A. D. 1897, at the time appointed by the Board, he tendered a bid to the Board for the paving of a certain district in Denver known as Broadway Paving District No. 2, which bid was the lowest filed with the Board that day, but the Board, by reason of its corrupt agreement with the other paving contractors, rejected his bid and attempted to award the contract to one of said contractors, although its bid was $6,000 higher than that of complainant, and that the city of Denver entered into a preliminary contract with the complainant by which they agreed to award him the contract in case he was the lowest bidder, but violated the same and refused to comply with its terms. The prayer for relief is that the city be enjoined from awarding the contract to this higher bidder and required to enter into a contract with the complainant in accordance with his bid.

II.

Specification of Errors.

The only error complained of is the action of the Court in dismissing the bill of complaint of its own motion, but since counsel for appellees have filed a motion to dismiss, together with a brief and argument in support of the same, it will be necessary to take up that also. We will, therefore, divide our argument into two heads—first, a discussion of the motion to dismiss the appeal, and, second, the merits of the case presented by the bill.

III.

Argument.

As just stated, we will discuss but two propositions—first, the motion to dismiss the appeal, and, second, the action of the Court in dismissing the bill.

The motion to dismiss is based upon the proposition that the Court below had no right to allow an appeal to this Court for the reason that the jurisdiction of that Court was not in issue. There is but one case cited in the brief filed which tends to support their conclusion, and that is Smith vs. McKay, 161 U. S., 355. In that case this Court held that, where objection was made in the Court below that a party had filed his bill in equity when he should have proceeded by an action at law, there did not arise a question of jurisdiction, within the meaning of the term as used in the act creating the Circuit Courts of Appeals. In other words, where the controversy was between citizens of

different States, the amount involved was $2,000, and the point arises as to which side of the Court, law or equity, the cause should proceed, there was not involved a question of the jurisdiction of the Court. We do not question the soundness of this ruling. In fact, as Mr. Justice Shiras said in delivering the opinion of the Court, to sanction appeals to this Court in a case of that kind would be to authorize every equity suit to be brought here where a demurrer was interposed upon the ground that there was an adequate remedy at law.

But this case presents an entirely different proposition. Here the question is a fundamental one, namely, whether the plaintiff has a right to bring any kind of an action, either at law or equity. The decision of the Court below, in this case, was to the effect that the subject matter of this bill did not present a cause or controversy within the meaning of that term as used in the Constitution of the United States. The final decree, found upon page 14 of the printed record, contained *inter alia* the following: "This Court has not and cannot have or obtain jurisdiction of this cause by reason of the fact that it does not present a matter coming within the jurisdiction of this Court, doth order said bill of complaint dismissed of its own motion." And the certificate of the Judge, found upon the next page, was to the same effect. We recognize, however, that this question is important, and, for the purpose of illustrating our position, will call attention to a number of authorities, and to our reason for believing that there is presented a

question of jurisdiction within the meaning of that term as used in the act authorizing appeals to this Court.

Section 2 of Article III. of the Constitution of the United States provides that "The judicial power shall extend to all cases in law and equity arising under this Constitution * * * between citizens of different States." And Section 1 of the act of March 3, 1887, as amended on August 13, 1888, and found in 25 Statutes at Large, page 433, provides as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, *of all suits of a civil nature, at common law or in equity*, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States, * * * or in which there shall be a controversy between citizens of different States." The Court will note that, both in the Constitution and the statute, the Courts of the United States are given jurisdiction only of *suits in equity or actions of law*, so that, unless there is a suit or action, there is nothing which calls into existence the power of the Court to hear and determine. It is also to be noticed that, by the statute, the State Courts are given concurrent jurisdiction with the Courts of the United States, so that it makes no difference where the complainant elects to bring his suit. If he has a *cause of action*, a suit or controversy arises, and it may be brought either in the Federal or State Courts, but if he has no cause of action, then no

suit or controversy can be said to exist, and he can go into no Court. It is upon this ground that we distinguish this case from that of Smith against McKay. The Court below in this case denied that Mr. Murphy, the complainant in the suit, had any cause of action against the respondent of any kind or nature, whatsoever. In other words, there was no cause of action, hence there could be neither suit in equity or action at law.

To determine the jurisdiction of a Court of the United States, there must be three factors—first, a suit of a civil nature; second, the value of the subject matter in dispute must exceed $2,000; third, it must be a controversy between citizens of different States, or some other of the matters set forth in the Constitution of the United States and the statute authorizing the Federal Courts to hear and determine the case. There are any number of decisions of this Court and of the other Federal tribunals to the effect that the question of whether or not there is really involved in the litigation $2,000 is one upon which depends the jurisdiction of the Court. There are also any number of decisions to the effect that whether or not the controversy is waged by citizens of different States, whether it arises under the Constitution of the United States, whether a State is being sued, or any similar question, is one upon which the jurisdiction of the Court determines. It was never doubted, as we understand it, that where any one of these questions is involved, but what, under the act creating the Circuit Courts of Appeals an appeal

can be taken to this Court. Why, then, should not an appeal be allowed when the first or primary requisite of a suit is also involved? When it is held by the Court that there is no suit or controversy, and that there is nothing presented for judicial determination, does not this raise in its most essential element a question of jurisdiction? The decisions of this Court and the authorities generally answer this question most emphatically in the affirmative.

Thus, Chief Baron Gilbert, in discussing the writ of *habeas corpus*, said: "If the commitment be against law as being made * * * in a matter for which by law no man ought to be punished, the Courts are to discharge." Bacon's Abridgment Habeas Corpus, B. 10. This upon the ground that the Court, in such a case, would have no power to hear and determine the matter, and its judgment would be a nullity. And this Court, in any number of criminal cases, has announced the same doctrine. Indeed, its entire jurisdiction to revise judgments of the Courts of the various States, upon the ground that a party has been convicted without due process of law, depends almost entirely upon this principle, namely, that the conviction has been had for a matter which did not constitute an offense. That is, the criminal complaint upon which a conviction was obtained did not state matters sufficient to constitute a cause of action under the Criminal Code.

Ex parte Siebold, 100 U. S., 371.

The same rule has been announced in civil cases from the beginning of this Court. It is laid down, in what has become a leading case, in language that practically disposes of the point here made: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; *if the petitioner states such a case in his petition that on a demurrer the Court would render judgment in his favor, it is an undoubted case of jurisdiction*, whether, on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law."

United States vs. Arredondo, 6 Peters, 691.

This definition of jurisdiction has been adopted by all text writers upon the subject and has become the recognized standard. It applies the test for which we contend—to confer jurisdiction, there must be a petition presented which states a cause of action. Indeed, the rule here announced has become fundamental, not only in judicial decisions, but in the statutory law of the United States. Every Code of Procedure expressly provides that the proposition as to whether or not a complaint states a cause of action may be raised at any time in a proceeding either in the Court of original cognizance or in the appellate tribunal. This was also a rule of the common law. It is a question

which cannot be waived by appearance and answer or even by judgment.

Applying this principle, this Court has expressly decided that a judgment even of a foreign tribunal, based upon subject matter which did not state a cause of action, was a nullity. This was announced by Chief Justice Marshall in the case of Rose vs. Himley, where he said: "And although the general power by which a Court takes jurisdiction of cause must be inspected in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty whether the situation of the particular thing on which the sentence is based may be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction in the passing of sentence. For example, in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question whether the vessel condemned was in a situation to subject her to the jurisdiction of that Court also examinable? This question, in the opinion of the Court, must be answered in the affirmative."

Rose vs. Himley, 4 Cranch, 241.

While this case has been doubted in some particulars, we do not believe this rule has ever been questioned. It directly sustains our contention that a Court, to acquire jurisdiction over parties, must act upon subject matter which gives rise to a suit. The same result is reached from an-

other class of decisions made by this Court, namely, all those cases where it holds that no inquiry will be made into any matter resting within the discretion of the executive or legislative branches of the government, and that no writ will issue to control those branches. All of these cases, if the doctrine advanced by appellees in this suit were correct, could not be made to rest upon the jurisdiction of the Court, and yet this Court has said in all of them that the Court had no jurisdiction to interfere—that is to say, the subject matter presented to the Court did not give rise to a suit of a civil nature, or was not a suit within the meaning of that term as used in the Constitution and laws. We call attention to the following cases upon this point:

Broshear vs. Mason, 6 Howard, 92.
Decatur vs. Spalding, 14 Peters, 497.
United States vs. Black, 128 U. S., 40.

And there are also a number of other decisions which bear directly upon the proposition that whether or not a complainant is the proper person to institute, or whether he has a sufficient interest to maintain a suit, is a question of jurisdiction. As a sample of these cases containing a broad discussion of the matter, we cite a late decision of the Supreme Court of Wisconsin.

State vs. Cunningham, 83 Wis., 90.

But we think this Court has decided the exact proposition in a case that has become a leading authority in all Anglo-Saxon jurisprudence. We refer to *In re* Sawyer, 124 U. S., 200. The facts of

that case are familiar. A Court of equity, in the District of Nebraska, assumed jurisdiction of a bill to restrain the city officers of Lincoln from certain acts which deprived the complainant of the position of Police Magistrate of that city. A temporary injunction was issued, and, for its violation, some of the defendants were punished for contempt. They appealed to this Court on a writ of *habeas corpus*, and the Court discharged them from contempt on the ground that the Court below had no jurisdiction whatever to entertain the bill. It surely will not be contended that in that case the jurisdiction of the Court was not involved. Let us suppose that, instead of Sawyer coming to this Court by a writ of *habeas corpus*, he had attempted to appeal under the act creating the Circuit Courts of Appeals, had that act been in force at that time—would this Court have entertained for a moment an application to dismiss the appeal upon the ground that the jurisdiction of the Circuit Court was not involved? The Court expressly decides that the Circuit Court of the District of Nebraska had no jurisdiction of the subject matter of the controversy, for the reason that it presented no matter calling into action the powers of the Court. In other words, there was no cause of action. The principle announced in that case is conclusive of the one at bar. The opening sentence of Mr. Justice Gray, in rendering the opinion of the Court, is as follows: "The question presented by this petition of the Mayor and Councilmen of the city of Lincoln for a writ of *habeas*

corpus is whether it was within the jurisdiction and authority of the Circuit Court of the United States, sitting as a Court of equity, to make the order under which the petitioners are held by the Marshal." So, in this case, the question presented by the record is whether it was within the jurisdiction and authority of the Circuit Court of the United States to entertain the bill filed by the complainant in this suit. The Court below held that it was not, and dismissed the bill, upon the authority of the opinion of the Circuit Court of Appeals for the Eighth Circuit in another case. That Court held that the complainant, no difference how grievous his injury or whatever his wrong, could maintain no action against the defendants.

And in Rosenbaum vs. Bauer, 120 U. S., 450, we find principles conclusive of this question. This Court refused to entertain jurisdiction of a mandamus removed from a State Court, on the ground of lack of jurisdiction over the subject matter. The citizenship and the amount in controversy were both present, but there was no cause of action. Mr. Justice Harlan says: "It is a constitutional right of the citizens of the several States having controversies with the citizens of other States, to have a national forum in which such controversies may be litigated." And if a Federal forum is denied to such a citizen upon the ground that he has no controversy, when he claims to have one, does not this raise a question of jurisdiction? If an appeal is allowed to this Court because a Circuit Court finds that a

citizen of another State has not a claim amounting to $2,000 against a citizen of a different State, should it not also be allowed when the Court finds that he has no claim of any kind, or for any amount? Is there the slightest difference in principle between the two cases? Whatever difference there is should be in favor of the citizen who has the door of the Court closed in his face under all circumstances and whatever may be his grievance.

It will not do to say that, if the law laid down by the Court of Appeals is correct, the door of the State Courts will also be closed. The statute says the Federal Courts have concurrent jurisdiction with the State Courts, and, as a citizen of Nebraska, Mr. Murphy has the choice of tribunals. He has the constitutional right to have his case, if he has any, heard by the Federal Courts, and when told he has no cause of action cognizable by the Courts, has the right under the statutes to have this question of jurisdiction or power passed upon by this Court.

This Court has decided two cases at this term in which it has supported our contention. One concerns the jurisdiction of Courts of equity in the sense for which we contend.

New Orleans Water Works Co. vs. New Orleans, 164 U. S., 471.

The other case should dispose of this motion to dismiss.

The record in the case at bar shows that the bill was dismissed and costs assessed against the

complainant. It is held that where a bill is dismissed for want of jurisdiction, the Court has no right to decree the payment of costs.

Citizens Bank vs. Cannon, 164 U. S., 319.

We would also urge that the certificate of the Judge in this case—that his reason for dismissing the bill was that the Court had no jurisdiction—ought to be conclusive, and suggest that if this Court believes the bill does present a matter subject to the jurisdiction of the Court, it ought, in any event, to reverse the decree.

The fine-spun distinction attempted to be made in the brief that the jurisdiction of the Court was not in issue in the Court below, it is scarcely necessary to refer to. It is true, in a sense, that there was no issue between the complainant and the defendants upon this point, because the Court never required the defendants to appear, *but it was in issue between the plaintiff and the Court.* The Court took issue with the complainant upon sight of his bill, and dismissed it without the formality of requiring answer or appearance on the part of the respondent. The fact that it did not give respondents an opportunity to raise the issue is immaterial. It was in issue within the meaning of the statute. We therefore respectfully submit that the motion to dismiss the appeal should be denied and the case heard upon its merits.

Second—The merits of this case.

The Court below dismissed this case under the rule announced by the Circuit Court of Appeals

for the Eighth Circuit in the case of The Colorado Paving Co. vs. Murphy, 78 Fed. Rep., 28. That was a case brought by Mr. Murphy to restrain the city of Denver from letting a paving contract upon another paving district in the city. Judge Hallett granted a temporary injunction, from which the respondents appealed, and the order was reversed, for the reason that the Court had no authority to make the same, because the plaintiff could not maintain such a suit, the Court stating the question in these words: "In other words, has the lowest bidder the legal capacity to maintain such a suit as that at bar?" It would serve no useful purpose to quote this opinion at length, as it is reported and published in the Federal Reporter, as above cited.

In contrast with that, however, we would call attention to the opinion of Judge Hallett, filed in that case, which is as follows:

"Hallett, J. The charter of the city of Denver contains many provisions regulating the manner of making public improvements and assessing the cost thereof upon the property benefited. Pursuant thereto an ordinance was passed establishing the Fifteenth Street paving district No. 1, and the Board of Public Works called for proposals for doing the work. In response to the call, five bids were made, of which, considered with reference to the cost of the work, the lowest was made by one William S. Hipp; the next higher was by complainant, who offered to do the work for $40,268.42; next above complainant in

price was the respondent, F. O. Blake & Co., who offered to do the work for $46,875.68. The other bids were higher than the last named. On receiving the proposals, the Board of Public Works first rejected the bid of Hipp for reasons which need not be stated. The Board also rejected the bid of complainant for the reason that he proposed to use California Alcatraz asphalt, which they declared 'is not of the standard or quality required in and by said petition and amended specifications, and is not the proper material to be used under said petition or amended specifications, and is of inferior quality and incapable of making an asphalt pavement equal to the best now laid in the city of Denver.'

"Thereupon the Board awarded the contract to F. O. Blake & Co., whose bid was $6,607,26 in excess of complainant's.

"The bill is filed to restrain the Mayor from making a contract with Blake & Co. as awarded by the Board, and to compel the city authorities to award the contract to complainant. It proceeds upon the hypothesis that complainant is the lowest reliable and responsible bidder for the work within the meaning of Section 46, Article VII. of the city Charter. It charges collusion between the Board of Public Works and F. O. Blake & Co. and The Colorado Paving Company, respondent in another suit of the same character as this, with a view to give all paving contracts in Denver to the last named companies. Upon this charge nothing will be said at this time; it can be more

properly considered at the final hearing of the cause. Upon the ground that complainant is the lowest reliable and responsible bidder, and, therefore, entitled to the contract, it seems that the injunction ought to be allowed, in so far as to restrain the city from entering into the contract with F. O. Blake & Co. The rejection of complainant's bid on the ground that he proposed to use Alcatraz asphalt was entirely arbitrary. The testimony tends to prove—and when it shall be taken in the usual manner before an examiner it will probably establish—the quality of Alcatraz asphalt as fully equal to the Trinidad Pitch Lake and the others mentioned in the specifications. Of those last mentioned in the specifications, the Pacific asphalt cement is found in the same county in California with the Alcatraz asphalt, and there is no reason to believe that it is in any respect different from the latter. Indeed, the testimony in the record tends to prove that there are many different mines from which good asphalt may be obtained and that the quality of a pavement depends more upon the skill of the workmen who compounds the materials than upon the mine or lake from which the asphalt may be taken. It appears in the testimony that every company and person engaged in the business of laying asphalt pavements has a contract with the owner of some asphalt mine by which he alone can have asphalt from such mine. In this way The Barber Asphalt Company, and its congenor in Colorado, The Colorado Paving Company, have control of the Trini-

dad Pitch Lake asphalt. F. O. Blake & Co. have control of the Pacific paving cement and the complainant controls the Alcatraz product. The statute in the first clause of Section 3, Article VII., enjoins upon the Board the duty of 'permitting and encouraging competition,' and in the third clause of the same section declares that 'in every instance the material shall be so described in the specifications, either by standard or quality, as will admit of genuine competition between contractors, so that there can be at least two or more bids by individuals or companies in no manner connected with each other.'

"Obviously, there can be no such competition under any rule which limits the number of places from which asphalt may be taken for doing the work. In this instance, the specifications called for Trinidad Lake asphalt, Pacific asphalt paving cement and Bermudez Lake asphalt, 'or other asphalt which, in the judgment of this Board, is of equal standard and quality.' If that clause relating to the judgment of the Board be not taken too strongly as providing for an arbitrary exercise of authority by the Board, no objection can be made to this form of specification. It ought to be sufficient to say that certain asphalt—giving the name by which it is known—and other asphalt of the same quality will be accepted. In the case at bar, the difficulty arises from the action of the Board in rejecting Alcatraz asphalt without investigation and without reason. If, upon testimony taken, it shall appear that this asphalt is as good as the others

named in the specifications, the complainant will be entitled to the contract clearly enough.

"Objection is made to the jurisdiction of the Court mainly upon the ground that the remedy should be mandamus, certiorari or an action at law for damages. All the remedies mentioned seem to be inadequate to the occasion. It is shown that the contract was ready to be signed and Blake & Co. were about to proceed with the work when the temporary writ was issued. Under such circumstances, no remedy can be effectual which will not serve to arrest the proceedings. In some jurisdictions the city is allowed to make the contract, and it is afterwards declared void in a proceeding by mandamus. (Boren & Guckes vs. Darke Co., 21 Ohio St., 311; State vs. York Co., 13 Neb., 57.) The wisdom of that practice is not apparent.

"In this Court we have not jurisdiction by mandamus (Bath County vs. Amy, 13 Wal., 244), and, therefore, we ought to proceed in equity to give the relief to which the complainant may be entitled.

"Objection is also made that the complainant, as a bidder only and not a contractor, has no right which he can maintain before the Court, and authorities are cited to this effect. (Commonwealth vs. Mitchell, 82 Pa. St., 343.) If, however, he became entitled to the contract in virtue of his bid, he ought to be able to stand on the principle of specific performance. The work of paving the streets is of a character to demand expensive preparation. If, after making such preparation

and spending time and money in the consideration of proposals, a contractor shall be subjected to the whim and caprice of the agents of municipal corporations, there will be small inducement to engage in such work. The complainant, having set up in the business of paving streets, has a direct pecuniary interest in the result of the efforts he has made to obtain contracts, and the public has an interest in common with him whenever it shall appear that he is 'the lowest reliable and responsible bidder' within the meaning of the city charter. Sound public policy demands that all avenues be kept open towards the enforcement of a statute which is intended to secure honesty and fair dealing in public expenditure.

"The injunction will be allowed upon complainant giving bond in the usual form in the sum of $2,000."

We have these two views of the Courts below contrasted. We believe upon both reason and authority that the view of Judge Hallett is the correct one, and will be sustained by this Court. If Mr. Murphy has not a cause of action on account of the matters set up in the bill of complaint filed in this suit, the law is a by-word and a reproach. The facts set up in his complaint unquestionably appeal to the moral side of the human conscience.

That a contractor should go to an enormous expense in getting himself in a position to lay an asphalt pavement; should take up proposals made by a city, and give to them his time and thought; should comply with every requirement

laid down by its organic law and the officers of the city; should tender to the proper city officials his bid, accompanied by the names of bondsmen with whom he has arranged to give a bond in a large sum and deposit with the city authorities thousands of dollars, as evidence of his good faith and a forfeit for failure to do what he says he will, and be deprived of his contract when clearly entitled thereto by reason of a corrupt agreement between the city officials and other contractors, and be given no remedy by the law of the land, is a monstrous proposition, shocking to our moral sense, and contrary to the dictates of our reason. No honest minded man will deny that a most grievous moral wrong is thereby inflicted upon an individual. And while it is not the domain of a Court of equity to enforce moral rights, we cannot but feel that the words of Judge Dillon in his lecture upon the "Laws and Jurisprudence of England and America" were written to inspire both Court and counsel to see and do the right in a case of this kind.

"The lawyer's work and business are, it is true, with human laws; but, let me repeat, the lawyer makes a grievous mistake who supposes law to be the mere equivalent of written enactments or judicial decisions. Theoretically and, for many purposes, practically, lawyers must discriminate law from morality, and define and keep separate and distinct their respective provinces. But these provinces may always adjoin each other, and ethical considerations can no more be excluded from the administration of justice, which is the

end and purpose of all civil laws, than one can exclude the vital air from his room, and live. A thousand times have I realized the force of this truth. If unblamed, I may advert to my own experience, I always felt, in the exercise of the judicial office, irresistibly drawn to the intrinsic justice of the case, with the inclination and, if possible, the determination to rest the judgment upon the very right of the matter. In the practice of the profession, I always feel an abiding confidence that if my case is morally right and just, it will succeed, whatever technical difficulties may appear to stand in the way, and the result usually justifies the confidence."

Laws and Jurisprudence, England and America, 17.

We will first call attention to the statutory provisions of the charter of the city of Denver.

Article III. relates to the Executive Department of the city, and Sections 33 to 40, inclusive, create the Board of Public Works and prescribe its duties.

Section 39 is as follows:

"The Board may, in the letting of contracts, impose such conditions upon bidders with regard to bonds and securities and guarantee of the good faith and responsibility of the bidders, and insuring the faithful completion of the work and keeping the same in repair, and providing for any other material matters or things that may be considered by the Board advantageous to the city."

Session Laws 1893, p. 169.

Article VII. relates to public improvements.

Section 3 of this article prescribes the method of creating paving districts and letting contracts for paving. It is divided into several subdivisions.

Subdivision No. 1 contains the following provision:

"Before ordering the improvements mentioned in this section or any of them, the Board of Public Works shall adopt full details and specifications for the same, permitting and encouraging competition."

Session Laws 1893, p. 202.

The third subdivision is as follows:

"If owners of a majority of the frontage to be assessed shall petition for paving, and for any particular materials for the wearing surface, then the improvements shall be ordered and the material so designated shall be used; but no paving shall be ordered unless a petition for the same is first presented, subscribed by the owners of a majority of the frontage to be assessed for the same; and in every instance the material shall be so described in the specifications, either by standard or quality, as will admit of genuine competition between contractors, so that there can be at least two or more bids by individuals or companies in no manner connected with each other."

Session Laws 1893, p. 203.

The fifth subdivision is as follows:

"The resolutions and orders of the Board of Public Works may be modified, confirmed or rescinded by said Board at any time prior to the pas-

sage of the ordinance authorizing the improvements."

Session Laws 1893, p. 203.

Section 46 of the same article prescribes how contracts shall be let, in the following language:

"All contracts for local improvements and all other contracts involving expenditures under direction of the Board of Public Works shall be let by the Mayor upon recommendation of the Board of Public Works, without any action of the City Council, except in the passage of the original ordinance authorizing the improvement or contract. All such contracts shall be let to the lowest reliable and responsible bidder, after public advertisement by the Board, for not less than ten days, in some newspaper of general circulation published in the city of Denver. Any other mode of letting such contracts shall be illegal and void. * * * In all advertisements, the Board shall reserve the right to reject all bids, and, upon rejecting all bids, may again advertise without further ordinance."

Session Laws 1893, p. 218.

These are the specific sections upon which we rely in this matter, although all the sections relating to the duties of the Board of Public Works and the ordering of public improvements have more or less bearing.

The following propositions of law construe similar provisions, and are applicable to the facts of this case.

First—Charter provisions of this kind, providing that contracts must be given to the low-

est reliable and responsible bidder, are mandatory, and must be strictly observed.

McGovern vs. Board, 57 N. J. L., 580.
People vs. Gleason, 121 N. Y., 631.
Hoole vs. Kinkead, 16 Nev., 217.
Kean vs. Elizabeth, 35 N. J. L., 351.
Pavement Co. vs. Painter, 35 Cal., 699.
Dean vs. Carlton, 23 Wis., 590.
People vs. Commissioners, 4 Neb., 150.
State vs. Barlow, 48 Mo., 16.
Boren vs. Commissioners, 21 Ohio St., 311.

Second—While Boards and city officials have discretionary powers in prescribing specifications, selecting material, etc., there must always be some rational basis of fact to sustain such exercise of discretion, and where a lower bid is rejected in favor of a higher, the mere passage of a resolution is not such an exercise of discretion as amounts to an adjudication. An adjudication of the kind had in this case, by the mere passage of a resolution, without some rational basis of fact to support it, is void.

1 Beach on Public Corporations, Sec. 698.
Dodd vs. Camden, 56 N. J. L., 258.
Adamson vs. Nassau Electric Co., 33 N. Y. Supp., 732.
People vs. Gleason, 121 N. Y., 63.
Talbot Paving Co. vs. Detroit, 67 N. W. Rep., 979.

The doctrine is better stated by the Court of Appeals of New York, perhaps, than anywhere else in the case of People vs. Gleason, *supra*. After

going over certain charter provisions, the Court says:

"This provision was inserted in the charter undoubtedly to prevent favoritism, corruption, extravagance and improvidence in the procurement of work and supplies for the city, and it should be so administered and construed as fairly and reasonably to accomplish this purpose. If contracts for work and supplies can be arbitrarily let, subject to no inquiry or impeachment, to the highest instead of the lowest bidder under such a provision as is found in this charter and substantially in the charters of all the other cities of the State, then the provision can always be nullified and will serve no useful purpose. If there were nothing in this record showing that the relator was not the lowest responsible bidder, it would have to be assumed that he was and that the members of the Common Council had discharged their duty and had so determined. But here it appears that the relator's bid was next to the highest and that there was no question or objection at any time that the lower bids were not formal and regular and made by responsible persons. It appears beyond doubt or cavil that the Common Council arbitrarily rejected the lower bids and accepted the relator's. That under such circumstances the relator's contract was illegal and void and that he cannot recover for his work is settled beyond controversy by the authorities in this State."

Third—The Board must adopt specifications which establish a standard and leave nothing to be

done except to calculate from the bids who is the lowest, and then consider his reliability and responsibility.

Mazet vs. City of Pittsburg, 137 Pa. St., 548.
People vs. Commissioners, 4 Neb., 150.
Sadler vs. Eureka County, 15 Nev., 39.
In re Eager, 46 N. Y., 100.

Fourth—In considering bids, a proposition to do work under a warranty is an agreement upon the part of the proposer that he will comply with the terms of the specifications, and that implies a full warranty of everything therein stated.

Boone vs. City of Utica, 26 N. Y. Supp., 932.

So that, when Murphy offered to lay a pavement in the city of Denver equal to the best then laid in the city, there was a warranty upon his part that he would do it, and the Board had no right to say in advance that he would not do it.

But the position of the Court of Appeals is that, admitting all this to be true, still the lowest bidder for the work has no right to maintain a suit, because the statute was not made for his benefit and his property rights are in no way affected. We submit that this is not the correct interpretation of the law. The authorities cited by the Court do not sustain this position. The chief case relied upon is that of Strong vs. Campbell, 11 Barb., 135, and that case will serve as a type of the authorities which are cited to sustain the position laid down by the Court. There a statute was passed that a postmaster should advertise in

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the newspaper having the largest circulation a list of the letters in the post-office which were uncalled for. The postmaster advertised in some other paper or failed to advertise at all, and the publisher of the newspaper having the largest circulation brought a suit to compel the enforcement of the statute. The Court held that the statute was not passed for his benefit and that he had no sufficient interest to maintain a suit of that character. The reasoning of the case, however, shows how different it is from the one at bar. Thus the Court said, in regard to the statute: "It secured to them no fixed and absolute right and imposed upon them no duty whatever. They were under no obligation to publish the list when offered, and their refusal would have involved no liability to any one. They might make a profit upon the performance of the duty, but they sustained no loss by its non-performance."

Strong vs. Campbell, 11 Barber, 135.

But in the case at bar, under the allegations of the bill of complaint, Mr. Murphy was bound to take this contract in case the city had awarded it to him; and, if he refused, would forfeit $5,000, in cash, which he had deposited with the city, under an agreement that he would take the contract. This, we contend, was a preliminary contract between him and the city to the effect that if he was the lowest bidder the contract would be given him. Here he came in actual contractual relations with the city. In the case reported in Barber there were no contractual relations between the plaintiff and

defendant, and, in fact, no relationship of any kind whatever.

But the authorities are not uniform in that line of cases, and the Federal authorities have decided the other way even upon the exact proposition passed upon in that case. Thus the District Court Judge for the District of Louisiana has held that the publisher of a newspaper of the largest circulation in New Orleans has a right to print under a statute of this kind.

United States vs. Smallwood, 27 Fed. Cas., 1129.

But, aside from this, we think the position of Judge Hallett that, since this statute was passed for the protection of the public, sound public policy demands that anyone interested in its performance should have the right to maintain a suit of this kind, is supported by the soundest logic.

The facts illustrated by these cases are sufficient to prove this fact. The difference in the bids for the paving of Broadway paving district No. 2 was some $6,000. Distributed over a large number of taxpayers, who would be compelled to pay this amount, it would only aggregate a few dollars' difference to each. No one has a sufficient interest to maintain a suit, and the result is that, unless the unsuccessful bidder, whose rights have been taken away by fraud and corruption, can bring it, no one will. Public officials will have practical immunity from justice when carrying out a conspiracy of this character.

We insist, however, that, under the terms of this statute itself, the lowest bidder is given a sufficient interest to maintain this suit. The statute provides that the Board shall have the right to reject *all bids*. This, by implication, denies the right to reject any single bid. The statute also provides that the contract shall be awarded to the lowest reliable and responsible bidder. The result of these two provisions is a direction by the charter of the city of Denver to the officers of the city to either reject all bids which are put in for work, and thereby announce that they do not propose to let the contract, or else to make an award to the lowest bidder. In other words, it is clearly a mandatory provision that the person who makes the lowest bid for work must be given the contract. Does not this give him a clear legal right to the contract? And if he has such legal right, has he not a sufficient interest in the statute to secure its enforcement? This is the rule announced by Judge Dillon in his work upon Municipal Corporations.

"As the purpose of such a provision in the charter is to secure, through competition, the most advantageous terms, something is necessarily left to discretion—to be fairly exercised, of course—of the Council in the adoption of the course which will best attain the end, and it does not contravene this restriction to call for bids for putting down various kinds of wood and stone pavements—some patented and some not—and afterwards, when all the proposals are in, selecting the one

which is relatively the lowest or the most satisfactory, all things considered; *but when the kind is thus selected, the lowest responsible bidder who has the lawful power to perform his undertaking has the absolute legal right to have the contract awarded to him.*"

1 Dillon on Municipal Corporations, Sec. 468.

The absolute legal right to a contract, with no power to appeal to the courts for an enforcement of this right, would be an absurdity.

The Court of Appeals says that the bidder knowingly puts the labor and expense of preparing his bid at the hazard of the city's action. This is not a correct statement of the facts. *A contractor knowingly puts the labor and expense of preparing his bid at the hazard of his being the lowest bidder.* The risk which he undertakes is not the arbitrary or corrupt action of the city officials, but that his bid will be the lowest. We can conceive of no reason why the provisions in the city charter denying to the Board the power to reject any single bid, and expressly requiring the award of the contract to the lowest bidder or else the rejection of all bids, was not intended for the benefit of the bidder as well as the taxpayer.

Again, it is said that the complainant has no property injured by the action of the Board. If it is meant that the complainant has no real estate abutting upon this paving district, this is probably correct; but if it is meant that complainant is not injured in his property rights by the action of the

Board in rejecting his bid, the Court is clearly mistaken. The bill alleges in this case that Mr. Murphy has spent years of his life in equipping himself to discharge public contracts; that he has established a reputation for himself in the business of laying pavements; that he has gone to time and trouble and expenditure of money in preparing his bid for this contract; that he has deposited with the officials of the city of Denver a certified check for the sum of $5,000, which is a forfeit in case he fails to enter into the contract, and that the action of the Board is an injury to him in all of these matters, and especially to his reputation as a public contractor. These property rights are injured by the Board, and surely they are not put to any hazard or risk in making his bid. The injury which he sustains in property is a thousand fold greater than that which any taxpayer sustains by reason of any difference to him in price between the bids. We know of no more sacred right to property than that of reputation in business to a business man. This has been injured in a most grievous manner by the action of the defendants in this case.

We cannot distinguish this case from that of bidders at an auction sale, where property is given to an auctioneer to be sold for the benefit of the owners. Every reason which the Court of Appeals has given to sustain its position could be used in favor of the proposition that the highest bidder at an auction sale would have no right of action in case there had been a corrupt and unl wful agree-

ment entered into between the auctioneer and other bidders. It could be said very readily that the bidding was for the benefit of the owner of the property and not for the benefit of persons buying; that their interest was to obtain the property sold at the lowest price, and not at the highest; that they put the time and preparation of making a bid at the hazard of its being accepted; and, in fact, everything which is said in the opinion of the Court of Appeals could be said against the highest bidder at such a sale, and yet, the authorities are unanimous that, in case there is a fraudulent agreement between the auctioneer or the owner and any other bidder or outsider, the bidder injured has a right of action. The cases are reviewed in Peck vs. List, 23 W. Va., 338.

The point has also been decided by the Court of Queen's Bench and this Court. The Queen's Bench hold that where an auctioneer offers property for sale, stating the sale to be without reserve and to the highest bidder, the very moment the highest bidder makes his bid, a contract of sale is entered into, and if there is any breach of this contract, the bidder has a right of action against the auctioneer. The Court said:

"We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward or that of a railway company publishing a time-table stating the time when and the places to which the trains run. It has been decided that the person giving the information ad-

vertised for or a passenger taking a ticket may sue upon a contract with him. (Denton vs. Great Northern Railway Company.) Upon the same principle, it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest *bona fide* bidder, and, in case of a breach of it, that he has a right of action against the auctioneer."

Warlow vs. Harrison, 1 Ellis & Ellis, 309.

And this Court has held that the acceptance of an offer made by a compliance with all of its terms creates a binding contract.

Tayloe vs. Merchants Fire Ins. Co., 9 How., 390.

United States vs. Shuey, 92 U. S., 73.

The same principle has been affirmed by the High Court of Justice in England, and also by the House of Lords.

Stevenson vs. McLane, Law Rep., 5 Q. B., 346.

Byrne vs. Van Teenhoven, Law Rep., 5 Com. Pleas, 344.

Dunlop vs. Higgins, 1 H. of L. Cas., 381.

And the very cases cited by the Court of Appeals to support its decision hold that the complainant has a right of action to the extent of a bill to enjoin the awarding of the contract. Thus,

in Talbot Paving Co. vs. City of Detroit, 67 N. W. Rep., 979, the Court, in concluding its opinion, says:

"It is apparent that if frauds may be perpetrated in that way, there is a remedy by injunction to prevent the making of a contract with the next highest bidder."

The Supreme Court of Pennsylvania has sustained an injunction suit brought by the lowest reliable and responsible bidder.

Paving Co. vs. Philadelphia, 164 Pa. St., 477.

And the Supreme Court of Illinois takes it for granted that in case there is fraud upon the part of the officers depriving a person of his bid, he may ask for an injunction.

Kelley vs. Chicago, 62 Ill., 279.

In Ohio and Nebraska the lowest bidder is given the right to maintain a suit by mandamus to compel the awarding of the contract to him, and this although the contract has already been given to another contractor.

Boren vs. Commissioners, 21 Ohio St., 311.
State vs. York County, 13 Neb., 57.

The Federal Courts, of course, have no right to award a writ of mandamus.

The Court of Appeals also denied that the complainant was entitled to maintain his bill as a suit for specific performance. According to the 13th allegation of the bill, the complainant entered into a preliminary contract with the city of Denver by which it was agreed that in case his bid was the lowest, the contract would be awarded to him.

This contract was in the shape of a written proposal by the city to bidders, which contained a copy of the contract ready for signature and stated that, in accordance with the terms of the charter of the city of Denver, the contract would be awarded to the lowest reliable and responsible bidder. One of the provisions of said contract signed by complainant is as follows:

"The bidder also proposes to be ready and appear at the office of the Mayor of the city of Denver and to duly execute the following form of contract, in accordance with the terms of this bid, and to furnish and have ready such sureties as may be satisfactory to the Board of Public Works in the city of Denver, and to do the same at any time within ten days of the date of a written notice so to do from the Board of Public Works, mailed to the address below given.

"As a guarantee of the good faith and responsibility of this bidder, there is enclosed a cashier's check on a Denver bank of known standing, in the sum of five thousand dollars ($5,000).

"Said check is made payable to the order of the Treasurer of the city of Denver, and if this proposal is not accepted within thirty days of the date hereof, it shall be returned to the undersigned. If it be accepted and the bidder shall not properly respond to such notice of acceptance as above provided, then said check shall be cashed and paid into the treasury of the city of Denver as liquidated damages for the failure to comply with the terms of this bid."

Our contention is that this made a binding contract with the city of Denver. The Court of Appeals denies this, for the reason that it takes two to make a bargain, and that Mr. Murphy was the only one who agreed to it. But this is not a correct statement of the facts. The city agreed to it by delivering this proposal to Mr. Murphy, securing his signature thereto, and by the mandatory provisions of the charter requiring the acceptance of his bid in case he complied with its proposals. The rule is well settled—and has been affirmed by this Court many times—that officers can only act legally within the strict provisions of the law, and it is a fundamental maxim with Courts of equity that that is done which ought to be done, and our position is that the city of Denver, by compelling Mr. Murphy to enter into a binding agreement to take this contract, bound itself to a like performance upon its own part. We hear a great deal in the books of unilateral contracts, but the term, in itself, is an absurdity. To make a contract, it must be mutually binding upon both parties, and Murphy cannot be compelled to pay his $5,000, and be subject to a suit for specific performance upon his part, unless he has a like remedy against the city. It is fundamental that the remedy of specific performance must be mutual, and we do not suppose that the Court of Appeals would hesitate for a moment in decreeing specific performance on a bill brought by the city of Denver of the contract entered into by Mr. Murphy, nor would the Court for a moment

listen to an action brought to recover back the $5,000. in case the city appropriated it on account of his failure to enter into the contract. Indeed, the Circuit Court of Appeals for the Fourth Circuit has held that this deposit of a certified check was a contract from which the contractor could not recede, and the city had a perfect right to keep the same.

Safety Ware Co. vs. Baltimore, 74 Fed. Rep., 363.

And it is well settled, of course, that not only would Mr. Murphy be compelled to lose his $5,000, but the city would have a right to an action for specific performance as well.

Fry on Specific Performance, Sec. 117 *et seq.*

We believe that this discussion of the principles involved herein is sufficient. The powers of Courts of equity have never been restricted; they have been used to thwart fraud in whatever shape it may appear. As has been well said by Mr. Justice Brewer:

"They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop State or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature and do justice to every individual."

Rock Island R. R. Co. vs. Union Pacific R. R., 47 Fed. Rep., 15.

And this Court, in affirming this judgment, spoke in no uncertain tones:

"It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented or old ones modified in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.'"

Union Pacific Ry. Co. vs. Chicago Ry. Co.,
163 U. S., 564.

The powers of such a Court are surely sufficient to right the wrongs disclosed by the bill of complaint in this case.

Respectfully submitted.

C. S. Thomas,
W. H. Bryant,
H. H. Lee,
Solicitors for Appellant.

Office Supreme Court, U. S.
MAR 22 1897
JAMES H. McKENNEY,
CLERK

IN THE

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Appellees.

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BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS APPEAL.

JAMES H. BROWN,
F. A. WILLIAMS AND
G. Q. RICHMOND,
Attorneys for Appellees.

C. J. KELLY, Printer, Denver.

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BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS APPEAL.

I.

NO ISSUE OVER JURISDICTION.

The right of appeal is purely statutory.

By Section 4 of the Appellate Courts' Act, the whole appellate jurisdiction in both Courts is appor-

tioned between the United States Supreme Court and the Circuit Courts of Appeal. That Section provides:

"The review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts, shall be had *only* in the Supreme Court of the United States, *or in* the Circuit Court of Appeals hereby established, *according to the provisions of this Act* regulating the same."

Section 5 of the same act provides:

"All appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"(1). In any case in which the *jurisdiction of the Court is in issue;* in such cases, the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

In this case, it does not appear that the jurisdiction of the Circuit Court for the District of Colorado was "*in issue.*" The phrase "in issue" means a controversy over a matter upon which one party denies what the other affirms.

There never has been an issue, at any step in this case, upon the question of jurisdiction. Appellant Murphy presented his bill of complaint to the United States Circuit Court for the District of Colorado (Judge Hallett presiding), requesting the issuance of a temporary injunction. Judge Hallett, following the opinion of the Honorable Court of Appeals of the Eight Circuit, in a similar case

lately decided between the same parties, ruled that he could not grant a temporary injunction. At the same time, he also stated that, under the same opinion, Appellant Murphy had no interest sufficient to maintain the suit, and he would be compelled to order the bill dismissed.

As the record in the case will show, no process whatever was ever served upon any of the appellees herein. The record shows the only process served was the citation on the prosecution of this supposed appeal. On this state of facts, there never was any issue tendered as to jurisdiction by any traverse or denial by any of the appellees, either that Hugh Murphy was not a citizen of the state of Nebraska, or that the sum or value of the matter in dispute did not exceed $2,000, exclusive of interest and costs.

Maynard vs. Hecht, 151 U. S., 324.

II.

No Contest Over the Powers Conferred on Circuit Courts.

Again, the clear purpose of the Appellate Court's act, in reserving to the Supreme Court of the United States the ultimate decision of questions of jurisdiction, was to provide for harmonious and uniform rulings as to the scope and extent of the authority and the powers conferred by law upon the several lower federal courts.

The word "jurisdiction" has two meanings: The primary meaning is, the *authority conferred by law* to hear a case.

"The power to hear and determine a case is jurisdiction; it is '*coram judice*' whenever a case is presented which brings this power into action."

U. S. vs. Arredondo, 6 Pet., 709.

The consent of parties cannot confer upon a tribunal what the law has not given it. So, in this sense, it is said, consent can never confer jurisdiction.

The other and secondary meaning of "jurisdiction" is, the course of procedure by which a matter before a tribunal is disposed of, as contra-distinguished from the power of authority conferred on it by law to make such disposition. As to objections to erroneous steps taken, coming under this definition of this jurisdiction, there may be legal consent and legal waiver by parties litigant.

"It is said a court of equity has not jurisdiction to decree damages, save as an incident; yet, if a defendant does not demur or object at the first opportunity, the jurisdiction is conceded. Here the term means something wholly different from its sense when we affirm that the same court has no jurisdiction to try a citizen for murder, or dissolve a corporation upon *quo warranto*. And this is not peculiar to a court of equity. It is an axiom in this department of law that consent cannot confer jurisdiction, and yet, without stopping to call it an exception, numerous decisions say that even silence will waive jurisdictional objections."

Pullman vs. Kinsinger, 2 Abb., 94; s. c., 20 Fed. Cas., 45; case No. 11, 463.

U. S. vs. Swan, 13 U. S. C. Ct. Apls., 78.

The distinction in the two meanings of jurisdiction seems to be this: In the primary sense jurisdiction means the power or *authority conferred by law*, and, in the second sense, the *mode* or manner of *exercising the power* conferred by law.

In other words, one means the *power* conferred; the other means the *mode of* exercising such power. So, it is said—

"The jurisdiction of the Court cannot depend upon its decision upon the merits of the case brought before it, but upon the right to hear and decide at all."

Ex parte Watkins, 7 Pet., 572.
Smith vs. McKay, 161 U. S., 355.

So, it is also said—

"An error occurred in the course of the proceeding, in the due exercise of jurisdiction, as distinguished from a case of want of jurisdiction."

Leroy vs. Clayton, 2 Saw., 499.

It is manifest that if the second meaning is to be attached to the word "jurisdiction," in the Appellate Court's act, that, in every case, an appeal on the merits will lie to the Supreme Court of the United States; whereas, it is the clear intent of the Appellate Court's act to relieve the Supreme Court of the United States, and throw the burden of correcting the erroneous exercise of jurisdiction upon the respective Circuit Courts of Appeal.

"The jurisdiction of the Court is not drawn in question by the denial of the right of the plaintiff to the judgment entered in its favor, nor is the authority of the Court to enter the judgment put in

question by the allegation that it is erroneous, so as to allow a writ of error from the Circuit Court direct to the Supreme Court, under the act establishing Circuit Courts of Appeals."

> Woodbridge & T. E. Co. vs. Ritter, 70 Fed., 679.
>
> World's Col. Exp. vs. U. S. 6, C. Ct. Apls., 70.

Neither the Circuit Court of Appeals, in its opinion, nor the Circuit Court below, in dismissing Murphy's bill, denied any right given by any act of Congress allowing Circuit Courts to entertain suits. The opinion of the Honorable Court of Appeals held that Murphy, as an unsuccessful bidder, had no sufficient interest to maintain any action. That simply determined a general proposition of law. The opinion sums it up in the sentence: "It goes not to defeat any particular cause of action, but to defeat the right to any relief." This is not a denial of want of power conferred by law upon any of the Circuit Courts of the United States. It is simply a decision that Mr. Murphy, as an unsuccessful bidder, is without sufficient interest to maintain any action in any Court—State or Federal.

The ruling of the Honorable Circuit Court for the District of Colorado in denying Appellant Murphy's application for a temporary injunction and dismissing his bill, in conformity with the opinion of the Honorable Court of Appeals in his former case, was not the disposition of any "case in which the *jurisdiction* of" "that Court was *in issue*." If an unsuccessful bidder has a right to equitable

relief, and the opinion of the Honorable Court of Appeals is incorrect, it was, at most, only an erroneous exercise of existing, acknowledged jurisdiction.

III.

Authority Over This Appeal Vested Exclusively in Circuit Courts of Appeal.

But, in the opening paragraph of appellant's complaint, he shows that jurisdiction in the Court below was claimed because appellant was a citizen of the state of Nebraska and appellees were citizens of the state of Colorado. By the Appellate Courts' Act the case must be taken, not to this Court, but to the Honorable Court of Appeals for the Eighth Circuit, for Section 6 of that Act provides that—

"The Circuit Courts of Appeals * * * shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Courts, and in the existing Circuit Courts *in all cases* other than those provided for in the preceding section, * * * and the judgments or decrees of the Circuit Courts of Appeal *shall be final in all cases* in which the *jurisdiction is dependent* entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states," etc.

By the construction, therefore, of the provisions of Sections 5 and 6 of the Appellate Courts' Act, the Supreme Court of the United States has no power to review by appeal any case "in which the jurisdiction is dependent entirely upon the opposite parties to the suit being citizens of different states."

This class of cases is practically excepted from the cases referred to (in subdivision I of Section 5), so that that section must practically read, "in any case in which the jurisdiction of the Court is in issue, excepting all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit being citizens of different states."

"By the Act of March 3, 1891 (26 Stat., 826, c., 517), establishing the Circuit Court of Appeals, the jurisdiction of this Court, in cases dependent upon divers citizenship, was taken away."

Wauton vs. DeWolf, 142 U. S., 138, 140.
C. & C. Co. vs. G. R. D. Co., 146 U. S., 54, 55.
Carey vs. H. & T. Ry., 161 U. S., 115, 133.
Rouse vs. Hornsby, 161 U. S., 588.

Since, therefore, authority to review the action of the United States Circuit Court for the District of Colorado is conferred exclusively on the Court of Appeals for the Eighth Circuit, there is no case here pending on appeal.

In support of our motion, we rely upon the following cases:

United States, *ex rel.*, Mudsill Mining Co., vs. Swan, 13 U. S. C. C. App., 77.
World's Col. Exposition vs. United States, 6 U. S. C. C. App., 70.
Smith vs. McKay, 161 U. S., 355.

JAMES H. BROWN,
F. A. WILLIAMS AND
G. Q. RICHMOND,
Attorneys for Appellees.